

a KANTAN JAYA MARINE SERVICES (PG) SDN BHD

v.

RHB BANK BHD

b HIGH COURT MALAYA, SHAH ALAM
LOW HOP BING J
[CIVIL SUIT NO: MT3-22-739-98]
16 FEBRUARY 2001

c **CIVIL PROCEDURE:** *Affidavits - Striking out (part of) - Striking out that part of affidavit referring to letters of correspondence from defendant to plaintiff - Whether letters were written on a "without prejudice" basis - Whether material to relief prayed for - Rules of the High Court 1980, O. 41 r. 6*

d **CIVIL PROCEDURE:** *Pleadings - Striking out statement of claim (part of) - Striking out that part of claim referring to letters of correspondence from defendant to plaintiff - Whether letters were written on a "without prejudice" basis - Whether relevant to plaintiff's cause of action - Rules of the High Court 1980, O. 18 r. 19(1)(d)*

e This was the plaintiff's appeal against the decision of the senior assistant registrar who allowed the defendant's applications to expunge a certain part of the plaintiff's statement of claim ('the impugned paragraph') under O. 18 r. 19 of the Rules of the High Court 1980 ('RHC') and certain paragraphs of an affidavit ('impugned affidavit') under O. 41 r. 6 RHC that was filed on behalf of the plaintiff. In the plaintiff's statement of claim, the plaintiff claimed negligence against the defendant occasioned by the defendant's delay in transmitting a sum of money that the plaintiff had applied to be remitted by way of telegraphic transfer into a Singaporean bank, as a result of which the plaintiff alleged to have suffered losses. The issue was whether the impugned paragraph and the impugned affidavit which sought to show that the defendant admitted to the said negligence and had agreed to negotiate for a settlement were part of a "without prejudice" communication between the parties concerned and therefore inadmissible.

Held:

h [1] In respect of the impugned paragraph, the letters referred to therein did not bear the label "without prejudice". The defendant's contention that the absence of the "without prejudice" label would in any event have the same consequence as letters bearing that label would immediately raise a controversy as to whether the communication between the plaintiff and

i

the defendant was in fact conducted on a “without prejudice” basis. Therefore, in light of this controversy, the court could not conclude that the said letters were plainly and obviously written on a “without prejudice” basis. **a**

[2] The inclusion of the impugned paragraph was a necessary, reasonable and natural step to take to establish the plaintiff’s cause of action on negligence. At this stage of the proceedings under O. 18 r. 19(1)(d) RHC, the court was not concerned with the plaintiff’s success or failure in its claim against the defendant. The court was only concerned with whether the impugned paragraph was relevant or otherwise an abuse of the process of the court. The court was not bound nor was it at liberty to examine the serious conflict or controversy in the affidavits filed by the parties herein. Serious consideration must only be given to the conflict or controversy at the full hearing of this suit. At this stage, it was not a plain and obvious case for striking out the impugned paragraph. **b**

[3] For the purpose of establishing the ambit of the word “scandalous” under O. 41 r. 6 RHC, the meaning of the word “scandalous” in O. 18 r. 19(1)(b) RHC would apply. It is taken to mean wholly unnecessary and irrelevant and not just unpleasant allegations. The contents of the impugned affidavit were not wholly unnecessary and irrelevant. They were necessary to show the truth of the allegation therein and were material with specific reference to the relief prayed for. **c**

[4] The impugned affidavit related to the correspondence between the plaintiff’s solicitors and the defendant’s bank and there was not the slightest indication of oppression or harshness against the defendant. Therefore, it could not be said to be oppressive within the meaning of O. 41 r. 6 RHC. In any event, the letters emanated from the defendant and not from the plaintiff and so there was no question of any oppression originating from the plaintiff. **d**

[5] In *Aluminium Industries Sdn Bhd v. Cookermate (M) Sdn Bhd*, it was held that the “without prejudice” letters between counsels were admissible because it was not possible to determine the issue without looking at the correspondence to see whether there was a binding agreement. The letters herein were not even labelled “without prejudice” and were not communications between solicitors but between the plaintiff’s solicitors and the defendant bank. **e**

[*Appeal allowed.*]

f

g

h

i

a Case(s) referred to:

Aluminium Industries Sdn Bhd v. Cookermate (M) Sdn Bhd [1990] 2 CLJ 777 (**fol**)
Abdul Rahim Abdul Hamid & Ors v. Perdana Merchant Bankers Bhd & Ors [2000] 2 CLJ 457 (**refd**)

Ansa Teknik (M) Sdn Bhd v. Cygal Sdn Bhd [1989] 2 MLJ 423 (**refd**)

Christie v. Christie [1873] LR 8 Ch App 499 (**refd**)

b Cracknell v. Janson [1879] 11 Ch D 1 (**refd**)

Goddard v. Parr [1855] 24 LJ Ch 783 (**refd**)

Kernick v. Kernick [1864] 12 WR 335 (**refd**)

Mui Bank v. Alkner Investments Pte Ltd [1990] 3 MLJ 385 (**refd**)

Oh Kuang Liang v. Associated Wood Ind Sdn Bhd [1995] 2 CLJ 961 (**not foll**)

Osmaston v. Association of Land Financiers [1878] WN 101 (**refd**)

c Re Jessop [1910] WN 128 (**refd**)

Rossage v. Rossage [1960] 1 WLR 249 (**refd**)

Legislation referred to:

Rules of the High Court 1980, O. 18 r. 19(1)(b), (d), O. 41 r. 6

d Other source(s) referred to:

Malaysian Court Practice (1998), MLJ Desk Edition, pp 510, 511, paras 18.19.4 & 18.19.7

For the plaintiff - Ivan Ho; M/s Ho & Partners

For the defendant - Chan Chong Choon; M/s Lee Hishammuddin

e Reported by Usha Thiagarajah**JUDGMENT****Low Hop Bing J:****f Appeal**

This is an appeal by the appellant ("the plaintiff") in encl. 32 against the decisions of the learned senior assistant registrar who had on 25 September 1999 allowed the respondent's ("the defendant's") applications made in:

g (1) Summons-in-chambers, encl. (5), by expunging certain parts of para. 13 of the plaintiff's statement of claim ("the impugned paragraph"); and

(2) Summons-in-chambers, encl. (17), by expunging paras. 15 to 17 of and exh. "TPK-5" annexed to the affidavit of Tan Pay Kong affirmed on 16

h November 1998 in encl. (6) filed on behalf of the plaintiff. (Paragraphs 15 to 17 are collectively referred to as "the impugned affidavit")**i**

Plaintiff's Claim

For the purposes of this judgment, it is necessary to put the plaintiff's claim in a proper perspective. The plaintiff's claim against the defendant is based on negligence allegedly occasioned by the defendant in failing to transmit by way of telegraphic transfer a sum of S\$730,000 ("the fund") in time to a Singaporean bank, United Oversea Bank ("UOB"). The plaintiff alleges that it had on 31 December 1997 applied through the defendant's Port Klang branch to remit the fund to UOB by way of telegraphic transfer.

The plaintiff further alleges that the fund was received by UOB on 3 January 1998, which was a Saturday and being a non-foreign exchange transaction day in Singapore, it was alleged that the plaintiff's agent in Singapore received the fund from UOB on 5 January 1998, after the fund was converted from Singapore dollars to US dollars. The plaintiff alleges that the defendant has failed to ensure that the fund was transmitted to UOB on 31 December 1997, ie, on the same day of the instruction. As a result of the purported delay, the plaintiff alleges that it has suffered various losses and claims, *inter alia*, for loss of income for three days on 2, 3 and 4 January 1998 in respect of a time charterparty entered into between the plaintiff and Petronas, foreign exchange loss, loss of interest and loss as a result of a claim by an unidentified third party.

The defendant denies the plaintiff's claims and has since filed and served its statement of defence.

Paragraph 13 of the statement of claim reads:

Melalui surat peguam plaintif bertarikh 13 haribulan Januari 1998 dan 14 haribulan Januari 1998 kepada defendan, defendan telah menjawab pada 20 haribulan Januari 1998 dan 21 haribulan Januari 1998 meminta maaf kepada plaintif tetapi, sehingga tarikh ini masih belum, enggan, abai, gagal dan tidak menjelaskan jumlah kerugian dan kehilangan pendapatan plaintif atau apa-apa bahagian daripadanya.

Plaintiff akan merujuk kepada surat-surat tersebut semasa perbicaraan tindakan ini.

(Translation:

By way of letters dated 13 January 1998 and 14 January 1998 from the plaintiff's solicitors to the defendant, the defendant replied on 20 January 1998 and 21 January 1998 apologizing to the plaintiff, but until the date hereof has yet to, refused, neglected, failed and did not, settle the plaintiff's damage and loss of income or part thereof.

The plaintiff shall refer to the said letters at the trial of the action herein.).

a Defendant's Applications

The defendant's first application is encl. (5), to strike out the writ and statement of claim pursuant to O. 18 r. 19 of the Rules of the High Court 1980 and/or under the inherent jurisdiction of the court ("Principal Prayer").
b Alternatively, the defendant prays that the impugned paragraph be struck out on the ground that it is irrelevant or otherwise an abuse of the process of the court ("Alternative Prayer").

The plaintiff opposed the defendant's application in encl. (5) and filed an affidavit (encl. (6)), the relevant paragraphs of which read:

- c** 15. Saya memohon merujuk perenggan 12, 13 dan 14 dan menyatakan bahawa surat-surat defendan bertarikh 20 haribulan Januari 1998, 21 haribulan Januari 1998 dan 23 haribulan Januari 1998 mengenai perundingan adalah jelas menunjukkan bahawa defendan adalah cuai dan bersetuju untuk berunding bagi penyelesaian.
- d** 16. Sesalanan surat-surat bertarikh 20 haribulan Januari 1998, 21 haribulan Januari 1998 dan 23 haribulan Januari 1998 dilampirkan dan ditandakan sebagai eksibit "TPK-5".
- e** 17. Saya memohon keizinan Mahkamah untuk merujuk kepada "TPK-5" iaitu surat bertarikh 21 haribulan Januari 1998 di mana pihak defendan sendiri telah mengakui bahawa terdapat kelewatan dan memohon maaf atas kelewatan tersebut.

(Translation:

- f** 15. I crave to refer to paragraphs 12, 13 and 14 and state that the defendant's letters dated 20 January 1998, 21 January 1998 and 23 January 1998 concerning negotiation clearly showed that the defendant was negligent and agreed to negotiate for settlement.
16. A copy each of the letters dated 20 January 1998, 21 January 1998 and 23 January 1998 is annexed hereto and marked as Exhibit "TPK-5".
- g** 17. I crave leave of the Court to refer to Exhibit TPK-5 i.e. letter dated 21 January 1998 in which the defendant admitted the delay and apologized for the said delay.)

The relevant paragraph of the letter dated 21 January 1998 reads:

- h** We do apologize for the one day delay in the transfer of funds and the Bank will be opened to consider actual loss incurred rather than opportunity loss.

- The defendant then filed the second application *vide* encl. (17) to expunge the impugned affidavit under O. 41 r. 6 of the Rules of the High Court 1980 and/or the inherent jurisdiction of the court on the grounds, *inter alia*, that the impugned affidavit forms part of a "without prejudice" communication between the plaintiff and the defendant in order to settle the dispute.
- i**

Both the aforesaid two applications were heard together by the learned senior assistant registrar. As alluded to above, on 25 September 1999, the learned senior assistant registrar allowed with costs the Alternate Prayer in encl. (5) by expunging the impugned paragraph and also encl. (17) by striking out the impugned affidavit. *a*

Submission For Defendant *b*

Encik Chan Chong Choon, learned counsel for the defendant, submitted that there is only one issue in this appeal ie, whether the impugned paragraph and the impugned affidavit pertain to a “without prejudice” communication between the plaintiff and the defendant. The thrust of his submission focussed on the following areas: *c*

- (a) The dispute between the plaintiff and the defendant in relation to the delay in remitting the fund to UOB by the defendant’s branch;
- (b) The plaintiff’s solicitors’ letters to the defendant dated 13 January 1998 and 14 January 1998 respectively; *d*
- (c) The meeting between the plaintiff’s managing director Tan Pay Kong and the defendant’s representatives, Goh Beow Hock, Ng Eng Whye and Ooi Kok Lik which took place on 19 January 1998;
- (d) Serious negotiations conducted between the plaintiff and the defendant with a view to settling the dispute; *e*
- (e) The defendant putting the plaintiff’s solicitors on notice of the on-going negotiations and the 14 days extension granted by the plaintiff to the defendant; *f*
- (f) The letter dated 21 January 1998 pursuant to the negotiation on 19 January 1998; and
- (g) The defendant’s disclaimer of all liability claimed by the plaintiff.

Learned counsel for the defendant referred to the law on “without prejudice” communication and urged that the decision of the learned senior assistant registrar be affirmed and that this appeal be dismissed with costs. *g*

Contention For Plaintiff

The essence of the submission by Mr. Ivan Ho, learned counsel for the plaintiff, is that the impugned paragraph and the impugned affidavit are relevant to the plaintiff’s cause of action based on negligence against the defendant and should not be expunged. He added that there are controversial issues surrounding the use of the letter dated 21 January 1998 and so he prayed that this appeal be allowed with costs. *h*

i

a Decision Of The Court

Having carefully considered the respective submissions of learned counsel for the plaintiff and for the defendant, I hold that the issues for decision in this appeal are:

- b** (1) Whether the impugned paragraph in encl. (5) is irrelevant or otherwise an abuse of the process of the court under O. 18 r. 19(1)(d)? and
- (2) Whether the impugned affidavit is scandalous, irrelevant or otherwise oppressive, under O. 41 r. 6?
- c** In respect of the impugned paragraph, it is to be observed that the letters referred to therein did not bear the label “without prejudice”. The contention for the defendant is to the contrary in the sense that the absence of the “without prejudice” label would in any event have the same consequence as letters bearing that label. This would immediately raise a controversy as to whether the communication between the plaintiff and the defendant was in fact conducted on a “without prejudice” basis. In the light of this controversy, I am of the view that this is not a conspicuous case in which the court can conclude that the said letters are plainly and obviously written on a “without prejudice” basis. The determination of this controversy would require mature consideration on the basis of *viva voce* evidence, after comprehensive, incisive and pervasive cross-examination and re-examination of the relevant witnesses at the full trial itself. The impugned paragraph is undoubtedly relevant to the plaintiff’s claim in that it is material or has a specific bearing on or particular reference to the matter in hand ie, the plaintiff’s claim based on negligence.
- d**
- e**
- f** The impugned paragraph is also not otherwise an abuse of the process of the court under O. 18 r. 19(1)(d). An abuse of the process of the court would arise, for example, where the intention is to embarrass the defendant: *Ansa Teknik (M) Sdn Bhd v. Cygal Sdn Bhd* [1989] 2 MLJ 423. Other examples of an abuse of the process of the court may be found in the *Malaysian Court Practice* (1998) MLJ Desk Edition at p. 511 para. 18.19.7 and would require no further elaboration here, except to say that those examples are by no means exhaustive and the categories are not closed. In my considered view, the inclusion of the impugned paragraph is a necessary reasonable and natural step to take in order to establish a cause of action founded on negligence as alleged and claimed by the plaintiff. At this stage of the proceedings under O. 18 r. 19(1)(d), this court is not concerned with the prospect of the plaintiff’s success or failure in the plaintiff’s claim contained in the impugned paragraph: *Abdul Rahim bin Abdul Hamid & Ors v. Perdana Merchant Bankers Bhd & Ors* [2000] 2 CLJ 457. This court is presently only concerned with whether the impugned paragraph is relevant or otherwise an abuse of the process of the
- g**
- h**
- i**

court. In doing so, this court is not bound nor is it at liberty to examine the serious conflict or controversy in the affidavits filed by the parties herein. As stated above, serious consideration must be given to the conflict or controversy at the full hearing of this suit. It is at this stage not a plain and obvious case for striking out the impugned paragraph.

The next issue is whether the impugned affidavit is scandalous, irrelevant or otherwise oppressive under O. 41 r. 6. The court has the power to strike out any paragraph in an affidavit which contains insulting remarks, offensive language, scandalous or oppressive matter: *Osmaston v. Association Of Land Financiers* [1878] WN 101; *Kernick v. Kernick* [1864] 12 WR 335; *Goddard v. Parr* [1855] 24 LJ Ch. 783; *Cracknell v. Janson* [1879] 11 Ch. D 1; *Rossage v. Rossage* [1960] 1 WLR 249; *Mui Bank v. Alkner Investments Pte Ltd* [1990] 3 MLJ 385, HC, Singapore.

For the purposes of establishing the ambit of the word “scandalous” under O. 41 r. 6, the meaning of the word “scandalous” used in O. 18 r. 19(1)(b) would apply. It is taken to mean wholly unnecessary and irrelevant and not just unpleasant allegations: *Malaysian High Court Practice (1998)* MLJ Desk Edition p. 510 para. 18.19.4. Upon a close and proper examination and scrutiny of the contents of the impugned affidavit, I am of the view that it is not possible to come to the conclusion that they are wholly unnecessary and irrelevant. Indeed, they are necessary to show the truth of the allegation in the impugned paragraph and is indeed material having a specific reference to the relief prayed in a claim based on negligence. This test of materiality with reference to the relief prayed for has been established by Lord Selborne LC in *Christie v. Christie* [1873] LR. 8 Ch. App. 499 at 503.

On the question of whether this court should strike out the impugned affidavit on the ground that it is otherwise oppressive, I am unable to hold that the impugned affidavit is oppressive. I am of the view that it does not oppress the defendant, neither is it harsh against the defendant. The impugned affidavit relates to the correspondence between the plaintiff’s solicitors and the defendant’s bank and there is not the slightest indication of oppression or harshness and so it cannot be said to be otherwise oppressive within the meaning of O. 41 r. 6. In any event, the letters emanated from the defendant and not from the plaintiff and so there can be no question of any oppression originating from the plaintiff.

It is very pertinent to point out that in *Re Jessop* [1910] WN 128, the English Court of Appeal refused to strike out extracts from letters marked “without prejudice” on the basis that they were not scandalous, irrelevant or oppressive.

- a* I am mindful of the judgment in *Oh Kuang Liang v. Associated Wood Ind Sdn. Bhd.* [1995] 2 CLJ 961, in which Abdul Malek Ishak J struck out para. 7 together with exh. 'C' of encl. (6) which referred to "without prejudice" letters between the parties' solicitors. However, Abu Mansor J (later FCJ) in *Aluminium Industries Sdn. Bhd. v. Cookermate (M) Sdn. Bhd.* [1990] 2 CLJ
- b* 777 held that the "without prejudice" letters between counsel were admissible because it was not possible to determine the issue without looking at the correspondence to see whether there was a binding agreement. I am more inclined to adopt and apply the approach of Abu Mansor, J (later FCJ) in *Aluminium Industries, supra*. Be that as it may, it is to be noted that the letters
- c* before me were not labelled "without prejudice" and were not communications between solicitors, but between the plaintiff's solicitors and the defendant bank. In my considered opinion, the contents thereof are neither scandalous, irrelevant nor otherwise oppressive under O. 41 r. 6.
- d* After a proper perusal of the relevant matters pleaded in the plaintiff's statement of claim in general and the impugned paragraph in particular, it is my view that the inclusion of the impugned paragraph cannot be said to be irrelevant nor is it otherwise an abuse of the process of the court under O. 18 r. 19(1)(d). Similarly, I am unable to conclude that the impugned affidavit is in any way scandalous, irrelevant or otherwise oppressive under
- e* O. 41 r. 6.
- In the circumstances, the answer to the aforesaid two issues are both in the negative, with the result that both the impugned paragraph and the impugned affidavit are not be struck out under O. 18 r. 19(1)(d) or the inherent jurisdiction of the court, or under O. 41 r. 6. Hence, the plaintiff's appeal is
- f* allowed with costs and both the aforesaid orders of the learned senior assistant registrar are hereby set aside.

g

h

i